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Textualism and the Executive Branch

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ABSTRACT

This Article examines the applicability of textualism to the executive branch. It claims that contrary to the conventional wisdom, the primary theoretical arguments for the new textualism apply with full force to statutory interpretation by administrative agencies and most other executive officials. It also points out, however, that proponents of the new textualism have endorsed a variety of legal doctrines that increase executive power in ways that are incompatible with textualist theory. The Article claims that recent efforts by prominent textualists to explain the apparent tension between their theories of executive and judicial power are either beside the point or unpersuasive. The Article therefore concludes that their broader legal theory, which simultaneously embraces the new textualism and unbridled executive discretion, is fundamentally incoherent.

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> [T]he balancing of various legal, practical and political considerations, none of which is absolute, is the very essence of prosecutorial discretion. To take this away is to remove the core of the prosecutorial function, and not merely "some" Presidential control.
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> The Court has, nonetheless, replaced the clear constitutional prescription that the executive power belongs to the President with a "balancing test." . . . Evidently, the governing standard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis. This is not only not the government of laws that the Constitution established; it is not a government of laws at all.**

INTRODUCTION

One of the most significant developments in American public law during the past quarter century has been the rise of the new textualism in statutory interpretation. This methodological approach, which is advocated most prominently by Justice Antonin Scalia and Judge Frank Easterbrook, relies upon the core proposition that courts should interpret a statute by ascertaining the plain meaning of its text when the statute was enacted.[1] Not only has textualism been credited with reviving academic interest in the field of legislation,[2] but there is a widespread belief that this theory has had a major impact on the way that virtually all mainstream judges and scholars understand and approach the process of statutory interpretation.[3]

Although a heavy reliance on statutory text is hardly novel,[4] the new textualism has caught on in recent years by incorporating lessons from political science about the nature of the legislative process and related constitutional arguments about the legitimate role of the judiciary in a representative democracy with separated powers.[5] These considerations allegedly lead to

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** Morrison v. Olson, 487 U.S. 654, 708, 711-12 (1988) (Scalia, J., dissenting).

1. *See, e.g.*, *In re* Sinclair, 870 F.2d 1340, 1343-44 (7th Cir. 1989) (Easterbrook, J.); ANTONIN SCALIA, A MATTER OF INTERPRETATION 14-37 (1997); *see also* WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 236 (2d ed. 2006) (explaining that "the meaning an ordinary speaker of the English language would draw from the statutory text is the alpha and the omega of statutory interpretation" for a new textualist).

2. *See* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992).

3. *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 30-36 (2006) (describing textualism's broad appeal and impact).

4. *See* Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-18, 419 (1899) ("We do not inquire what the legislature meant; we ask only what the statute means.").

5. *See, e.g.*, John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) [hereinafter Manning, *Textualism*]. *See also infra* Part I.

the conclusion that a successfully enacted statute is a "deal" between competing private interests that should be enforced by the judiciary according to its plain terms.[6] Any other view would be hopelessly naïve and incompatible with the structure of the United States Constitution. Taken to its logical conclusion, therefore, the new textualism would even forbid courts from exercising equitable discretion or departing from clear statutory language to avoid absurd results when they engage in statutory interpretation.[7]

Like the proponents of other theories of statutory interpretation, advocates of the new textualism have focused almost exclusively on the appropriate role of the judiciary in this enterprise.[8] It is widely understood, however, that the judiciary does not have primary responsibility for interpreting statutes in the modern regulatory state.[9] Rather, this task is performed initially, and often exclusively, by administrative agencies and other executive officials who are delegated authority to implement federal programs.[10] Yet, the manner in which the executive branch does and should carry out this task has only recently begun to receive scholarly attention.[11] And, paradoxically, almost no one believes that executive officials are obligated to be textualists when *they* interpret statutes.

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6. *See generally* Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001 (2006) [hereinafter Staszewski, *Avoiding Absurdity*] (describing textualism's conception of the legislative process and constitutional structure).

7. *See* Manning, *Textualism*, *supra* note 5; John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. Rev. 2387 (2003) [hereinafter Manning, *Absurdity*]; John C. Nagle, *Textualism's Exceptions* 2 (2002), *available at* http://www.bepress.com/ils/iss3/art15 (claiming that "when the statutory text admits of no ambiguity, then the results of that interpretation—absurd or otherwise—become irrelevant to the textualist").

8. For the most notable exception, see Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1 (2004) [hereinafter Easterbrook, *Judicial Discretion*]. *See also infra* notes 123-34 and accompanying text (discussing Easterbrook's position).

9. *See* Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 502-03 (2005) (recognizing that the modern regulatory state is "a legal world where agencies are, by necessity, the primary official interpreters of federal statutes").

10. *See* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1190, 1196 (2006) (recognizing that statutory interpretation is "a core function of the executive branch," and explaining "that in a great many instances of executive branch statutory interpretation, the question of judicial review does not arise").

11. *See* Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673 (2007); Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889 (2007); Mashaw, *supra* note 9; Morrison, *supra* note 10; Richard J. Pierce, Jr., *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197 (2007); *see also* Peter L. Strauss, *When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321 (1990).

This Article begins an examination of the applicability of textualism to the executive branch. Part I provides an overview of the theoretical underpinnings of the new textualism and explains that the theory is purportedly driven by a constitutionally motivated understanding of legislation and the proper role of unelected officials who are responsible for implementing the law. Part II claims that contrary to the conventional wisdom, the primary theoretical arguments for the new textualism apply with full force to statutory interpretation by administrative agencies and most executive branch officials. Part III points out, however, that no one has even tried to suggest that executive branch officials are obligated to implement statutes in a textualist fashion. Justice Scalia, for example, is practically an advocate of "dynamic statutory interpretation" when it comes to the executive branch's role in this enterprise.[12] Indeed, the most strident advocates of textualism are generally the strongest proponents of broad and unconstrained executive discretion, even when this authority could be used to undermine countless legislative deals. For example, textualists routinely defend the absolute enforcement discretion of executive officials, as well as binding judicial deference toward reasonable interpretations of "ambiguous" statutory provisions by federal agencies.[13] Accordingly, there is considerable tension between textualist theory and the positions that are taken by textualists regarding executive branch authority.

Part IV explains that some prominent textualists have begun to recognize this tension and seek to distinguish the proper role of the executive branch and judiciary in implementing statutes.[14] Although these arguments may persuasively explain why a fair amount of executive discretion is necessary and appropriate, they are not responsive to the observation that the primary theoretical arguments for textualism apply to most instances of executive branch statutory interpretation. Moreover, the strict separation of governmental functions and formal division between law and policy that tacitly underlie these arguments tend to break down in precisely the relevant contexts. Finally, the "political accountability" of the chief executive that is routinely invoked in favor of broad claims of executive authority is not meaningful enough, in reality, to carry the heavy weight that is assigned to it by theories of this nature. On the contrary, the teachings of public choice theory that purportedly underlie the new textualism would suggest that the

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12. *See, e.g.*, Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983) ("The ability [of the federal bureaucracy] to lose or misdirect laws can be said to be one of the prime engines of social change, and the prohibition against such carelessness is (believe it or not) profoundly conservative."); *see also infra* notes 69-79 and accompanying text.

13. *See infra* notes 60-79 and accompanying text.

14. *See* Easterbrook, *Judicial Discretion*, *supra* note 8; Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280 (2006).

dangers of political faction are magnified in the context of unconstrained decision making by the executive.

The Article therefore concludes that a "faithful agent" of the legislature could always adhere to the plain meaning of a statute or be capable of exercising a reasonable degree of policy discretion, but an advocate of the new textualism cannot have it both ways. Making the latter choice demonstrates, moreover, that the constitutional and legislative-process based arguments for textualism are ultimately unpersuasive, even to the most committed textualists. Although a heavy emphasis on the text could still be defended in statutory interpretation for other reasons, modern textualist theory loses much of its content and force when stripped of those underpinnings.

I. THE NEW TEXTUALISM IN STATUTORY INTERPRETATION

The traditional goal of statutory interpretation has been to ascertain the legislature's intent with respect to the precise question at issue.[15] The new textualism, which emerged as a distinctive methodological approach during the Reagan Administration,[16] rejects this principle and posits that the only legitimate goal of statutory interpretation is to ascertain the "plain meaning" of the text to an ordinary speaker of English when the statute was enacted.[17] The advocates of this approach have provided spirited critiques of the judiciary's use of legislative history to determine what Congress sought to achieve when it enacted a statute.[18] They maintain that the judiciary should rely instead on textual sources of meaning, including the ordinary understanding of relevant statutory provisions, related parts of the same act and the whole code, and longstanding canons of statutory construction, to determine what the elected officials who participated in the lawmaking process formally agreed "to say."[19] A statute's underlying purpose and its policy consequences in a particular case may only be considered under this approach to choose from among two or more linguistically permissible

15. *See* ESKRIDGE ET AL., *supra* note 1, at 221; DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 89 (1991).

16. *See* Frickey, *supra* note 2, at 255 (explaining that "in Scalia, the so-called 'new textualism' found the right person—brilliant, bold, and nothing if not persistent—at the right place (the Supreme Court), at the right time, when there would be people to educate and followers to lead among the Reagan–Bush appointees").

17. *See* FARBER & FRICKEY, *supra* note 15, at 90.

18. *See, e.g.*, *In re* Sinclair, 870 F.2d 1340, 1342-44 (7th Cir. 1989) (Easterbrook, J.); SCALIA, *supra* note 1, at 29-37; *see also* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 987-91 (4th ed. 2007) (describing the textualist critique of legislative history and collecting sources).

19. *See* ESKRIDGE ET AL., *supra* note 1, at 235-36 (describing the sources of guidance used by textualists).

meanings that remain after a thorough examination of the statute's "semantic context."[20]

The "intent skepticism" that underlies the new textualism is based in part on the collective action problems facing an ongoing multi-member institution that were recognized by legal realists.[21] New textualists have also relied, however, upon more recent lessons about the legislative process from political science to underscore the difficulties of attributing a meaningful intent to Congress beyond what is reflected by "the clear social meaning of the enacted text."[22] First, they invoke interest group theory to claim that legislation is best understood as a fragile compromise between competing private interests, rather than a single-minded effort to achieve its underlying policy goals.[23] Second, they rely upon Arrow's Paradox and other aspects of social choice theory to argue that the preferences of individual representatives cannot be aggregated into a coherent collective decision, and that final legislative outcomes frequently turn on undetectable strategic or procedural variables.[24] Third, they rely upon proceduralist theories to emphasize the array of hurdles that must be surmounted before a bill becomes a law, and point out that a statute's language and its degree of specificity may have been chosen "to clear the varied veto gates encountered along the way to enactment."[25] The upshot is that because "the precise lines drawn by any statute may reflect unrecorded compromises among interest groups, unknowable strategic behavior, or even an implicit legislative decision to forego costly bargaining over greater textual precision," new textualists believe that the only safe course for a faithful agent of Congress is to enforce the clear terms of the statutes that have emerged from the legislative process.[26]

New textualists also claim that the judiciary's obligation to serve as a faithful agent of Congress and treat "the clear social meaning of the enacted text" as dispositive for purposes of statutory interpretation is compelled by the Constitution.[27] Specifically, they rely upon the requirements of bicame-

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20. *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006) [hereinafter Manning, *What Divides*].

21. *See* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

22. *See* John F. Manning, *Justice Scalia and the Legislative Process*, 62 N.Y.U. ANN. SURV. AM. L. 33 (2006); Manning, *Absurdity*, *supra* note 7, at 2408.

23. *See* Frank H. Easterbrook, *The Supreme Court, 1983 Term–Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15-16 (1984); Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1346-47 (1994); Manning, *Absurdity*, *supra* note 7, at 2410-12.

24. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983) [hereinafter Easterbrook, *Statutes' Domains*]; Manning, *Absurdity*, *supra* note 7, at 2412-13.

25. Manning, *Absurdity*, *supra* note 7, at 2417-18.

26. *Id.* at 2390.

27. *See id.* at 2431-45; Manning, *Textualism*, *supra* note 5, at 56-78; John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685 (1999).

ralism and presentment to point out that only the statutory text, which was formally approved by both chambers of Congress and the President, is authoritative.[28] Because this observation does not resolve which sources of guidance may be used to interpret a statute's meaning, textualists have also emphasized that the purpose of those safeguards is to impose a supermajority requirement on the legislative process that facilitates bargaining and thereby prevents the domination of otherwise vulnerable political minorities.[29] By giving political minorities "exceptional power to block legislation as a means of defense against self-interested majorities," the constitutional structure "makes it more crucial for interpreters to respect the lines of legislative compromise," even if the resulting decisions might seem incoherent or unprincipled as a policy matter.[30]

Moreover, textualists rely upon judicial independence and the separation of legislative and judicial functions contemplated by the Constitution to challenge the legitimacy of exercises of judicial discretion that deviate from plain statutory meaning.[31] The theory is that if the legislature knows that it will have no role in implementing the laws it enacts,[32] Congress will be more likely to craft bright-line rules that reduce the discretion of the executive and judicial officials who possess that authority.[33] The enactment of bright-line rules, rather than open-ended standards, will in turn promote the advantages associated with the rule of law and reduce the potential for the

28. *See, e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators. As the Court said in 1844: 'The law as it passed is the will of the majority of both houses, *and the only mode in which that will is spoken is in the act itself* . . . .'") (quoting Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1844) (emphasis added by Justice Scalia)); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68-69 (1994) ("No matter how well we can know the wishes and desires of legislators, the only way the legislature issues binding commands is to embed them in a law.") (emphasis omitted).

29. *See* Manning, *Absurdity*, *supra* note 7, at 2437; Manning, *Textualism*, *supra* note 5, at 74-78. *See also* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997) [hereinafter Manning, *Nondelegation*] (arguing that interpretive reliance on legislative history creates an opportunity for legislative self-delegation, contrary to the clear assumptions of the constitutional structure).

30. Manning, *Textualism*, *supra* note 5, at 76-78.

31. *See* Staszewski, *Avoiding Absurdity*, *supra* note 6, at 1022-28 (summarizing and critiquing this argument).

32. According to some textualists, this principle explains the problem with authoritative use of legislative history by the judiciary in statutory interpretation. *See* Manning, *Nondelegation*, *supra* note 29; SCALIA, *supra* note 1, at 35 (claiming that the legislative powers that are authorized by the Constitution are nondelegable and that "Congress can no more authorize one committee to 'fill in the details' of a particular law in a binding fashion than it can authorize a committee to enact minor laws").

33. *See* Manning, *Textualism*, *supra* note 5, at 67-68.

arbitrary exercise of discretionary authority.[34] If Congress really wants to provide preferential treatment for a favored interest, it will need to make this decision explicit on the face of a statute, thereby promoting political accountability.[35] When courts interpret statutes contrary to their plain meaning and thereby alter the plain scope of bright-line rules, the judiciary necessarily undermines the Constitution's sophisticated process of reducing arbitrary decision making and promoting political accountability.[36]

The new textualism's understanding of the legislative process and constitutional structure is consistent with the rational basis test that is used to assess the constitutional validity of ordinary legislation because this standard tolerates substantial legislative imprecision and limits judicial authority to second-guess legislative directives.[37] It is also consistent with a broader jurisprudential preference for "the rule of law as a law of rules,"[38] which prizes law's externality and the related notion that we live under a government of laws, and not of people.[39] Indeed, the driving force behind the new textualism appears to be an effort to make the law more objective and to limit the policy discretion of unelected officials.[40] Although the same objectives could be pursued solely for pragmatic reasons,[41] the new textualism is both powerful and distinctive precisely because of its claim that these goals are required by a proper understanding of the legislative process and the constitutional structure.

The new textualism has dramatic and controversial implications for statutory interpretation. First, courts should not rely on legislative history to ascertain Congress's intent in a particular case.[42] Second, courts may not consider a statute's underlying purpose to ascertain its meaning in a particu-

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34. *See* Manning, *Absurdity*, *supra* note 7, at 2434-36. *See also* FREDERICK SCHAUER, PLAYING BY THE RULES 98-99, 158-62 (1991) (describing the role of rules in allocating power among institutions).

35. *See* Manning, *Absurdity*, *supra* note 7, at 2437.

36. *See id.* at 2434-37.

37. *See id.* at 2446-54.

38. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) [hereinafter Scalia, *Rule of Law*].

39. *See* Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) ("It is the proud boast of our democracy that we have 'a government of laws and not of men.'"); Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 349 (1992) ("Our Constitution creates a government of laws and not of men.").

40. *See* William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1514 (1998).

41. *See, e.g.*, ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 1-4 (2006). Although I have previously claimed that the absurdity doctrine and other equitable approaches to statutory interpretation are justified on institutional grounds, see Staszewski, *Avoiding Absurdity*, *supra* note 6, at 1043-64, the persuasiveness of exclusively pragmatic arguments for textualism is beyond the scope of this Article.

42. *See supra* note 18 and accompanying text.

lar case when the ordinary meaning of the enacted text is clear.[43] Third, the judiciary may not exercise equitable discretion to limit the reach of a statute's language to better achieve its underlying goals when unanticipated problems arise.[44] Finally, courts may not deviate from the plain meaning of statutory language to avoid patently absurd results.[45] Rather than challenging these conclusions, the next Part examines whether the theory underlying the new textualism applies in the same manner to statutory interpretation by the executive branch.

II. TEXTUALIST THEORY AND THE EXECUTIVE BRANCH

The rise of the new textualism has led legislation scholars to devote renewed attention to the judiciary's proper role in statutory interpretation. Meanwhile, administrative law scholars have been lavishing attention on the level of deference that the judiciary should provide to statutory interpretation by administrative agencies.[46] This is an important question because regulatory agencies and other executive officials are the primary interpreters of statutes in the modern regulatory state. Nonetheless, public law scholars have only recently begun to ask how the executive branch does and should carry out this task. Although a negative answer appears to be almost universally presumed, no one has specifically examined whether the primary theoretical justifications for the new textualism apply to the executive branch.[47] This Part explains that they do.

First, the new textualism's legislative-process critique of the concept of legislative intent applies with full force to statutory interpretation by administrative agencies and other executive branch officials. The simple reason for this conclusion is that these particular arguments for textualism focus on the alleged nature of the legislative process, rather than on the identity or characteristics of the officials who are subsequently exercising inter-

43. *See* Manning, *What Divides*, *supra* note 20, at 84 (explaining that when at least two linguistically plausible meanings remain after thoroughly examining a statute's semantic context, "textualists think it quite appropriate to resolve that ambiguity in light of the statute's apparent overall purpose"); SCALIA, *supra* note 1, at 20 ("Well of course I think that the act was within the letter of the statute, and was therefore within the statute: end of case."). *See also* Molot, *supra* note 3, at 45 (describing the limited circumstances in which aggressive textualists will consider policy consequences and statutory purposes).

44. *See* Manning, *Textualism*, *supra* note 5.

45. *See supra* note 7 and accompanying text.

46. *See* Mashaw, *supra* note 9, at 501 ("Since *Chevron v. Natural Resources Defense Council*, forests have been laid waste to publish the outpouring of legal commentary on that decision and its progeny.") (citation omitted).

47. Judge Easterbrook and Michael Herz have, however, thoughtfully addressed the tension between textualism and the *Chevron* doctrine. *See* Easterbrook, *Judicial Discretion*, *supra* note 8; Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663 (1991).

pretive authority. Thus, the collective action problems of an ongoing multi-member institution will continue to exist regardless of who is implementing the final legislative product. The same is true of interest-group bargaining, the difficulties of aggregating majoritarian preferences, the prevalence of strategic and procedural maneuvering, and the need to frame legislation in a manner that enables it to overcome veto-gates. The upshot, once again, is that because "the precise lines drawn by any statute may reflect unrecorded compromises among interest groups, unknowable strategic behavior, or even an implicit legislative decision to forego costly bargaining over greater textual precision," the only safe course for a faithful agent of Congress is to enforce the clear terms of the statutes that have emerged from the legislative process.[48]

For the same reason, the implications of bicameralism and presentment for statutory interpretation by the judiciary should also apply when this task is performed by agencies and other executive branch officials. The statutory text is the only authoritative source of law that can emerge from the legislative process regardless of who is interpreting it. Moreover, the concessions that political minorities were able to secure in the legislative process as a result of these structural safeguards should presumably be respected by the executive branch as well as by the judiciary. If the goal of bicameralism and presentment is to facilitate bargaining and prevent the domination of otherwise vulnerable political minorities by majority factions in the legislative process,[49] the constitutional structure should compel all subsequent interpreters to "respect the lines of legislative compromise" that are reflected in the final legislative product.

Third, the incentives for the legislative enactment of bright-line rules and efforts to facilitate congressional accountability that are allegedly fostered by the separation of governmental functions could not be maintained if agencies and other executive branch officials ignored the text is of statutes. In other words, if the Constitution is designed to encourage Congress to enact bright-line rules to promote the advantages of the rule of law and reduce the potential for arbitrary exercises of discretionary authority, those goals would be undermined at least as much if the executive branch was permitted to deviate from the plain meaning of statutory commands as they would be if this authority was granted to the judiciary.[50] Although adminis-

48. *Cf. supra* note 26 and accompanying text.

49. *See supra* notes 28-30 and accompanying text.

50. Indeed, Professor Manning's historical evidence for this claim refers explicitly to the separation of functions between the legislative and executive branches, rather than between the legislative and judicial branches. *See* Manning, *Textualism*, *supra* note 5, at 67, 77 & n.267 (claiming "[s]o long as the legislature retained control over *the law's executors*, it would more likely enact vague laws leaving broad discretion to those who applied them," and explaining that "[s]ince the concept of executive power had traditionally included judi-

trative agencies in particular are not exempt from subsequent congressional influence, this distinction from the judiciary would seem to cut in favor of limiting their discretionary authority to deviate from clear statutory mandates for purposes of promoting congressional accountability. If the concern is that Congress could otherwise enact generally applicable rules and subsequently pressure (or allow) officials who are responsible for implementing the law to exempt favored interests without facing any political accountability for those decisions, this is a far greater danger in the regulatory process than it is within the judiciary.[51] The realization of this concern is, in fact, a familiar part of the story of "regulatory capture."

For the foregoing reasons, the theoretical arguments for the new textualism that are based on the legislative process and constitutional structure apply with full force to statutory interpretation by administrative agencies and other executive branch officials. The broader jurisprudential concerns that underlie this theory would seem to apply to executive branch statutory interpretation as well. Simply put, an effort to promote objectivity in the law and limit the discretionary authority of unelected officials would be furthered by requiring administrators and most other executive branch officials to adhere to the plain meaning of statutory text when they exercise delegated authority.[52] The only major theoretical argument for textualism that does not apply seamlessly to executive branch statutory interpretation involves the permissive nature of the rational basis test that is used by courts to assess the constitutional validity of ordinary legislation,[53] and the implications of this argument outside of the judicial context are highly ambiguous.[54]

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cial functions, many writings of this era use the term 'executor' to include judges") (citing W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 5 (1965)) (emphasis added).

51. For further development of this point, see *infra* notes 108-113, 159-164 and accompanying text.

52. The lone possible exception to this principle would be when delegated statutory authority is exercised personally by the President. For a discussion of the potential role of his political accountability in distinguishing the appropriate methodology of statutory interpretation by the executive branch, see *infra* Part IV.

53. *See supra* note 37 and accompanying text.

54. *Cf.* Mashaw, *supra* note 9, at 507-10 (considering the applicability of the "avoidance canon" to statutory interpretation by executive agencies and claiming that "[c]onstitutionally timid administration both compromises faithful agency and potentially usurps the role of the judiciary in harmonizing congressional power and constitutional command"); Morrison, *supra* note 10 (evaluating the applicability of the avoidance canon to executive branch statutory interpretation and concluding that this question turns on the theoretical justification for the canon and whether the statute is deemed ambiguous by an agency with a superior understanding of the underlying statutory purpose). As Mashaw points out, the complexity of this question stems partly from the fact that an agency is typically responsible for interpreting statutes and is potentially subject to judicial review. Because most statutory classifications are upheld under the rational basis test, agencies should presumably not worry about the constitutional validity of ordinary legislative classifications when they interpret statutes. On the other hand, to the extent that the permissive nature of the rational

In sum, textualism is based on specific understandings of legislation and the need to impose limitations on the implementation of the law by unelected officials in other branches of government. It should therefore follow inescapably from this perspective that administrative agencies and other executive branch officials should interpret statutes in a textualist fashion.[55] Thus, under textualist theory, agencies and other executive officials should not rely on legislative history to ascertain Congress's intent.[56] Moreover, agencies and other executive officials should not consider a statute's underlying purpose when the semantic meaning of its text is clear or exercise equitable discretion to limit a statute's reach to better achieve its underlying goals when unanticipated problems arise.[57] Finally, agencies and other executive officials should not deviate from the plain meaning of statutory language to avoid patently absurd results.[58] Not only are the foregoing propositions inconsistent with the conventional wisdom and existing practice, but the next Part explains that even the most firmly committed textualists do not believe that administrative agencies and other executive branch officials are required to implement statutes in a textualist fashion.

III. TEXTUALISTS AND THE EXECUTIVE BRANCH

It is widely recognized that textualists tend to be fans of the executive branch of government.[59] They have therefore enthusiastically embraced

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basis test is understood as a limitation on *judicial authority*, see Manning, *Absurdity*, *supra* note 7, at 2446-54, agencies could potentially exercise greater discretion than courts to refine imprecise statutory classifications in ways that deviate from the plain meaning of statutory text.

55. Advocates of the unitary executive theory might object to my treatment of agency heads and other subordinate executive officials as "unelected" on the grounds that all of their decisions could be attributed to the President. Not only is this position unrealistic, but it blinks away the fundamental problem of legitimacy of the modern regulatory state. I therefore believe that it is appropriate to treat unelected public officials as unelected for purposes of this analysis. *See infra* Part IV (claiming that the alleged political accountability of the President and administrative agencies does not justify unconstrained executive discretion).

56. For a non-textualist argument to the contrary, see Strauss, *supra* note 11.

57. For a documentation and defense of the contrary practice, see Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277 (1982).

58. For a non-textualist argument to the contrary, see Cass R. Sunstein, *Avoiding Absurdity? A New Canon in Regulatory Law*, 32 ENVTL. L. REP. 11, 126 (2002).

59. *See, e.g.*, Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505, 1533 (2008) ("Justice Scalia's argument for restricting standing is part and parcel of his more general argument for expanded presidential power, [including] the power to change public policy through deliberate nonenforcement of law."); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1334 (1990) (claiming that "part of the textualist agenda is enhanced executive power at the expense of the other branches—particularly the judicial branch").

legal theories and doctrines that shift authority from the judiciary to administrative agencies and the President. Because textualism is also portrayed as a broad limitation on judicial authority, the way in which textualists have understood the proper roles of the judiciary and the executive branch has struck most commentators as perfectly coherent. The reality, however, is that these doctrines and theories allow the executive branch to implement statutes in a (non-textualist) manner that is virtually certain to undermine countless legislative deals. Accordingly, there is considerable tension between textualist theory and the administrative-law and related separation-of-powers jurisprudence that is endorsed by leading textualists.

The most obvious way that textualists allow the executive branch to ignore the plain meaning of statutory language is by maintaining that decisions not to enforce the law are "generally committed to an agency's absolute discretion," and therefore presumptively immune from judicial review.[60] While neither Justice Scalia nor Judge Easterbrook was on the Supreme Court that decided *Heckler v. Chaney*,[61] they have both strongly embraced this principle on the grounds that an agency's decisions regarding whether and how to enforce most statutes are political judgments that are inevitably based on the resolution of competing interests.[62] Because courts are not in a good position to know "what else" an agency has been assigned to do with its limited resources, discretionary policy decisions to "do nothing" about a particular problem are none of the judiciary's business.[63] Justice Scalia has therefore candidly declared, for example, that "[e]stablishing environmental requirements is one thing; enforcing them is something else."[64]

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60. *See* Heckler v. Chaney, 470 U.S. 821, 831 (1985).

61. Then-Judge Scalia did, however, dissent from the D.C. Circuit's conclusion that the non-enforcement decision was subject to judicial review and that the agency's decision was arbitrary and capricious on the merits. *See* Chaney v. Heckler, 718 F.2d 1174, 1192 (D.C. Cir. 1983) (Scalia, J., dissenting).

62. *See* Frank H. Easterbrook, *On Not Enforcing the Law*, REGULATION 14-16 (Jan./Feb. 1983) [hereinafter Easterbrook, *Not Enforcing*]; Antonin Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 HOUS. L. REV. 97, 104-09 (1987) [hereinafter Scalia, *Responsibilities*]; Antonin Scalia, *The Role of the Judiciary in Deregulation*, 55 ANTITRUST L.J. 191 (1986) [hereinafter Scalia, *Role of Judiciary*].

63. *See* Scalia, *Role of Judiciary*, *supra* note 62, at 192-96. *See also* Easterbrook, *Not Enforcing*, *supra* note 62, at 15-16 ("Prosecutorial discretion is as much part of 'the law' as any other rule," and "[m]aking the most of a budget sometimes requires enforcers to make selective changes in the contours of the legal rules they have been handed by Congress.").

64. *See* Scalia, *Responsibilities*, *supra* note 62, at 105. For an example of Justice Scalia putting this principle into practice, see Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 65-67 (2004) (holding that the Bureau of Land Management's failure to prohibit off-road vehicles in certain wilderness study areas in alleged violation of its statutory duty to manage those areas so as not to impair their suitability for preservation as wilderness was not subject to judicial review because "[t]he prospect of pervasive oversight by federal courts

Textualists also advocate relatively strict limitations on standing to protect the executive branch's political decisions regarding how and whether to implement federal regulatory programs. Justice Scalia has argued that such limitations on standing should be understood as an essential element of the separation of powers that preclude the judiciary from interfering with the policy choices of the executive.[65] His theory is that the judicial role should be limited to protecting the vested legal rights of specific individuals from deprivation by the political branches of government.[66] His opinions have therefore consistently sought to prevent regulatory beneficiaries from pursuing "generalized grievances" against the executive branch based on its alleged failure to comply with the terms of regulatory statutes, even when Congress has explicitly authorized such adjudication.[67] In the absence of an "injury in fact," the executive branch would therefore be free to ignore the plain meaning of numerous statutory provisions.[68]

A stated benefit of preventing judicial interference with the executive branch's political discretion is that previously enacted statutory mandates that no longer command majority support can be rendered obsolete. Justice Scalia openly acknowledges that the foregoing limitations on judicial review would mean that "important legislative purposes, heralded in the halls

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over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA").

65. *See* Scalia, *supra* note 12; Antonin Scalia, *Rulemaking as Politics*, 34 ADMIN. L. REV. xxv (1982) [hereinafter Scalia, *Rulemaking*]; *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1982) (Scalia, J.) ("To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" (quoting U.S. CONST., art. II, § 3)).

66. *See* Scalia, *supra* note 12, at 894-97.

67. *See Lujan*, 504 U.S. at 577; *see also* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 198 (2000) (Scalia, J., dissenting); FEC v. Akins, 524 U.S. 11, 29-30 (1998) (Scalia, J., dissenting).

68. *See* Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*: Standing as a Judicially-Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1200-01 (1993) ("The broad reasoning of the majority opinion would . . . yield a holding that federal courts lack jurisdiction to enforce [a] clear and explicit congressional policy decision because no agency violation of the statute can produce a cognizable form of injury through a cognizable causal sequence."). *Cf.* Scalia, *Rulemaking*, *supra* note 65, at xxvi (explaining that ripeness and standing doctrines traditionally "enabled many rules to be issued with the practical assurance that they would never be subject to the rational, nonpolitical scrutiny of the courts"). At times, Justice Scalia appears to suggest that his approach would not allow agencies to deviate from unambiguous statutory mandates, see *id.* at xxx (claiming that "there is no room for political accommodation or the application of unanalytic value judgment in the Food and Drug Administration's implementation of the Delaney Amendment, which requires the banning of food additives that have been shown to cause cancer in animals"), but he has also recognized that "if all persons who could conceivably raise a particular issue are excluded [from seeking judicial review], the issue is excluded as well." Scalia, *supra* note 12, at 892.

of Congress, [could] be lost or misdirected in the vast hallways of the federal bureaucracy."[69] He sees this as a positive development, however, because "[t]he ability to lose or misdirect laws can be said to be one of the prime engines of social change."[70] Judge Easterbrook has likewise argued that changes in the law can be legitimately initiated outside of the legislative process by public officials who have been delegated the authority to implement regulatory programs.[71] Thus, when it comes to the executive branch's role in implementing the law, leading textualists have a tendency to become advocates of "dynamic statutory interpretation."[72]

This tendency is apparent in the texualists' wholehearted embrace of the *Chevron* doctrine.[73] *Chevron* famously held that courts and agencies must both follow Congress's intent when it explicitly resolved an issue that later arises in statutory interpretation, but that the judiciary must defer to reasonable interpretations of ambiguous statutory provisions by administrative agencies.[74] Justice Scalia has explained that one of *Chevron*'s "major advantages from the standpoint of governmental theory . . . is to permit needed flexibility, and appropriate political participation, in the administrative process."[75] In contrast, "[o]ne of the major disadvantages of having the courts resolve ambiguities is that they resolve them for ever and ever; only statutory amendment can produce a change."[76] He has, therefore, concluded:

> If Congress is to delegate broadly, as modern times are thought to demand, it seems to me desirable that the delegee be able to suit its actions to the times and that continuing political accountability be assured, through direct political pressures upon the Executive and through the indirect political pressure of congressional oversight.[77]

Similarly, Judge Easterbrook has pointed out that one practical advantage of delegating interpretive authority to agencies is that this practice "ex-

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69. Scalia, *supra* note 12, at 897.

70. *Id.*

71. *See* Easterbrook, *Not Enforcing*, *supra* note 62, at 16. *See also* Easterbrook, *Judicial Discretion*, *supra* note 8, at 7-8 (describing how "delegation expedites change").

72. *Cf.* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

73. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting); Krzalic v. Republic Title Co., 314 F.3d 875, 882 (7th Cir. 2002) (Easterbrook, J., concurring); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989) [hereinafter Scalia, *Judicial Deference*]; Easterbrook, *Judicial Discretion*, *supra* note 8, at 1.

74. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

75. Scalia, *Judicial Deference*, *supra* note 73, at 517.

76. *Id.* This proposition was recently rejected by the Supreme Court over Justice Scalia's vigorous dissent. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

77. Scalia, *Judicial Deference*, *supra* note 73, at 518.

pedites change" by allowing regulators to make necessary adjustments to the governing law in response to changed political circumstances or technical considerations "without the need for contentious debate in Congress."[78] The conferral of this discretionary authority on agencies is appropriate because in contrast to the federal judiciary, "Congress and the President can control bureaucrats" through their oversight and removal powers.[79]

Commentators have previously recognized that textualism and *Chevron* are in tension with one another on several different levels.[80] First, there is no textual authority for the *Chevron* doctrine,[81] and the plain meaning of the APA suggests that courts are to resolve issues of statutory interpretation de novo.[82] Second, *Chevron* adopts a fundamentally different understanding of the process of statutory interpretation than does textualism.[83] A textualist judge constructs a single correct answer to a statutory problem based on the plain meaning of the text in context and, at least in the absence of an authoritative administrative interpretation, definitively resolves any remaining ambiguity.[84] Meanwhile, however, agencies are free to adopt any "reasonable" interpretation when the statute is ambiguous. Texualist interpretation by a court is decidedly static because the court's obligation is to construe the statute's plain meaning at the time of enactment and its decisions are binding on other courts and executive branch officials "for ever and ever."[85] Meanwhile, agency statutory interpretation under *Chevron* is properly dynamic. Indeed, while "policymaking" by courts is anathema to modern textualism, *Chevron* expressly declared that "an agency to which Congress has delegated policymaking responsibility may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments."[86] *Chevron* is therefore widely un-

78. Easterbrook, *Judicial Discretion*, *supra* note 8, at 7-8.

79. *See id.* at 8.

80. *See generally id.* at 1; Herz, *supra* note 47, at 1663.

81. *See* Herz, *supra* note 47, at 1664-67.

82. *See* 5 U.S.C. § 706 (providing that "the reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions, . . . [and shall] hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"). Ironically, when Justice Scalia has attempted to square *Chevron* with the Court's traditional practice, he has relied upon the legislative history of the APA. *See* Scalia, *Judicial Deference*, *supra* note 73, at 512-13.

83. *See* Easterbrook, *Judicial Discretion*, *supra* note 8, at 2-4; Herz, *supra* note 47, at 1668-72.

84. *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351 (1994).

85. *See supra* text accompanying note 76.

86. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984).

derstood, for better or for worse, to have candidly equated the resolution of statutory ambiguity with "policymaking."[87]

It is possible, of course, to square *Chevron*'s analytical framework with a textualist interpretive methodology if *Chevron*'s respective steps are understood and applied in a certain way. Specifically, step one could be used to ascertain the plain meaning of the statutory text in its semantic context. Step two would therefore only be reached in relatively unusual circumstances when two or more textually plausible interpretations remained after this inquiry or when Congress delegated extremely broad authority to an agency to promote the public interest in a particular area. Finally, the "reasonableness" inquiry under step two would be quite forgiving, especially in the latter scenario.[88] Justice Scalia has, in fact, suggested something along these lines when he explained *Chevron*'s underlying appeal to textualists:

> One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt. Contrariwise, one who abhors a "plain meaning" rule, and is willing to permit the apparent meaning of a statute to be impeached by the legislative history, will more frequently find agency-liberating ambiguity, and will discern a much broader range of "reasonable" interpretation that the agency may adopt and to which the courts must pay deference. The frequency with which *Chevron* will require *that* judge to accept an interpretation he thinks wrong is infinitely greater.[89]

There are, however, some limitations on this explanation that prevent it from completely eliminating the tension between *Chevron* and the new textualism. First, textualists do not always follow this approach when they review the legality of an agency's interpretive decisions.[90] In this regard, neither *Chevron* nor *Mead* involved the interpretation of statutory provisions that ordinary applications of the textualist methodology would deem

87. *See, e.g.*, Jerry L. Mashaw, *Imagining the Past; Remembering the Future*, 1991 DUKE L.J. 711, 713 (1991).

88. Indeed, the entire step two inquiry is difficult to square with textualist theory. *See* Herz, *supra* note 47, at 1670 ("The step two inquiry into the 'reasonableness' of the agency's interpretation seems to go beyond the limits of the textualist inquiry.").

89. Scalia, *Judicial Deference*, *supra* note 73, at 521 (emphasis omitted). There is some empirical support for Justice Scalia's analysis. *See* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 831-32 (2006) (finding that Justice Scalia is the least deferential justice in *Chevron* cases).

90. *See* Gregory E. Maggs, *Reconciling Textualism and the* Chevron *Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 421-22 (1996) (claiming that Justice Scalia self-consciously relaxes his usual textualist methodology in *Chevron* cases).

"ambiguous."[91] Moreover, the fundamental importance that textualists attribute to the *Chevron* doctrine would be lost if the judiciary's deference to administrative interpretations of statutes was so narrowly limited. When agencies implement broad delegations of authority to regulate in the public interest, their policy decisions are reviewed by courts under the arbitrary and capricious standard because they are not ordinarily understood as the product of "statutory interpretation."[92] The other form of "ambiguity" that is recognized by textualism involves situations where two or more textually plausible interpretations remain after a thorough examination of a statute's semantic context.[93] Textualists would otherwise resolve the ambiguity in those situations by considering the underlying purposes of the statute and other policy consequences.[94] Thus, deference to reasonable agency interpretations is entirely sensible and non-controversial in those situations solely for pragmatic reasons. It is therefore difficult to see why the *Chevron* doctrine is so sacrosanct to textualists, and more specifically, why judicial deference to reasonable agency interpretations is thought to require *a shift in interpretive authority* from courts to agencies.

Leading textualists have emphasized, however, that *Chevron* is justified by a fictional presumption that Congress intends to delegate interpretive authority to resolve statutory ambiguity to administrative agencies rather than courts.[95] They have also suggested that the scope of statutory ambiguity may be broader under *Chevron* than it would be under ordinary applications of the textualist methodology. As Justice Scalia has explained:

> If *Chevron* is to have any meaning, then, congressional intent must be regarded as "ambiguous" not just when no interpretation is even marginally better than any

91. *See* United States v. Mead Corp., 533 U.S. 218, 224-25 (2001) (explaining that the interpretive issue was whether day planners were "diaries . . . bound" under the relevant legal provision); *Chevron*, 467 U.S. at 840 (explaining that the validity of the EPA's regulation turned on whether an existing plant that contains several pollution-emitting devices is a "new or modified major stationary source" of air pollution under the Clean Air Act).

92. *See, e.g.*, Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co. ("*State Farm*"), 463 U.S. 29 (1983).

93. *See* Manning, *Absurdity*, *supra* note 7, at 2463 (claiming that statutory ambiguity only exists from a textualist perspective when "a given phrase has several relevant social connotations"); *see also* Manning, *What Divides*, *supra* note 20 (distinguishing textualism from purposivism on the grounds that textualists emphasize semantic context over policy context and vice versa).

94. *See* Manning, *What Divides*, *supra* note 20, at 84-85 (explaining that "when a statute is ambiguous, textualists think it quite appropriate to resolve that ambiguity in light of the statute's apparent overall purpose").

95. *See* Scalia, *Judicial Deference*, *supra* note 73, at 516-17. *See also* Easterbrook, *Judicial Discretion*, *supra* note 8, at 5-6 (claiming that *Chevron* deference is based on the principle that "Congress may delegate a law-making power to the Executive Branch, whose decisions must be respected because they are ultimately political"); Krzalic v. Republic Title Co., 314 F.3d 875, 882-84 (7th Cir. 2002) (Easterbrook, J., concurring) ("Agencies' interpretive role stems from delegation of authority, not raw ambiguity.").

> other, but rather when two or more reasonable, though not necessarily equally valid, interpretations exist. This is indeed intimated by the opinion in *Chevron*—which suggests that the opposite of "ambiguity" is not "resolvability" but rather "clarity."[96]

Thus, regardless of precisely when textualists will find a statute ambiguous and move to the second step of the analysis, they ultimately seem to favor the *Chevron* doctrine because it shifts interpretive authority from the judiciary to administrative agencies and the executive branch.

One consequence of expanding the scope of statutory ambiguity and shifting interpretive authority from the judiciary to agencies is that the prevailing interpretive methodology will change in a certain range of cases. If a textualist court would otherwise resolve an issue in a particular way based on the plain meaning of the statute in context, and an agency was expected to follow the same methodological approach to the question, there would be no reason for the judiciary to defer to the agency's conclusion. Judge Easterbrook has therefore persuasively explained that *Chevron*'s true importance for a textualist lies in the fact that "[a] judge who announces deference is approving a shift *in interpretive method*" because "[e]verything an agency is likely to rely on—political pressure, the President's view of happy outcomes, cost–benefit studies, legislative history (including letters or tongue-lashings from members of Congress, as well as the committee reports), and the other tools of policy wonks—is off limits to textualist judges."[97] In other words, *Chevron* only makes sense for a textualist if agencies are *not* expected to interpret statutes in a textualist fashion.[98]

One consequence of shifting the prevailing interpretive methodology in this range of cases will be to shift policymaking authority from the enacting Congress and the legislative branch to administrative agencies and the executive branch. This is true because, other things being equal, the judiciary is more likely than executive branch agencies to respect the original legislative deal, irrespective of contemporary political preferences.[99] There may be good reasons to endorse dynamic statutory interpretation, but they should not be compelling to a textualist who purportedly believes that legislation is a fragile compromise between competing private interests that should be enforced by a faithful agent according to its plain terms. At the end of the day, *Chevron* conflicts with textualism because it increases the likelihood that public officials who are responsible for implementing the law will deviate from the "deals" that were enacted by the legislature.

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96. *See* Scalia, *Judicial Deference*, *supra* note 73, at 520.

97. Easterbrook, *Judicial Discretion*, *supra* note 8, at 3 (emphasis added).

98. *See id.*; Herz, *supra* note 47, at 1673-74.

99. *See* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975); *see also* Herz, *supra* note 47, at 1667-68 ("The political result reflected in the statute will more likely be respected by neutral courts than by accountable, politically appointed agencies.").

Perhaps ironically, textualists have sought to justify these potential deviations from previous legislative deals based on Congress's presumed intent and a variety of other policy considerations. Aside from the fact that this mode of justification poses conflicts with their jurisprudential method, there are good reasons to question whether Congress would endorse a presumption that equates statutory ambiguity with a delegation of interpretive authority to executive branch agencies. First, as explained above, administrative agencies are more likely than the federal judiciary to deviate from the original statutory deal based on new developments or political considerations.[100] While a legislature with sincere policy objectives might welcome an agency's potential ability to make a statutory scheme more effective in the face of changed circumstances, this could be accomplished by a doctrine of judicial respect for the well-considered views of agencies in resolving statutory ambiguity.[101] Moreover, the self-interested Congress that is envisioned by textualism would presumably be more concerned about preserving the sanctity of its own directives and constraining executive discretion.[102] A legislature that hoped to achieve its policy objectives or preserve the sanctity of its own directives would also be concerned about potential disobedience or back-sliding by the executive branch in response to political opposition. These observations are especially true when the President is a member of a political party different from that of the enacting Congress, which has routinely been the case in contemporary American politics.[103]

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100. *See supra* note 99 and accompanying text; *see also* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 474-76 (1989) (explaining that Landes's and Posner's "analysis implies that at least with respect to important questions of statutory meaning—those terms of the legislative 'deal' that would have mattered to the original bargainers—Congress typically intends the court rather than the agency to control interpretation," but claiming that "we have little basis for divining with any acceptable degree of confidence the legislature's 'typical' expectation regarding the role of courts and agencies in determining statutory meaning"); Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1279-80 (2002) ("One need not share Landes and Posner's understanding of the legislative process as a forum for interest group bargaining to see that subjecting legislative enactments to revision in the administrative process would undermine the Constitution's careful allocation of legislative authority among Representatives, Senators, and the President.").

101. *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944).

102. Some legislators may want to enact ineffective legislation to earn political credit from voters and avoid the costs to regulated entities that would result from faithful executive branch enforcement. Any theory of public law that affirmatively sought to facilitate this behavior would, however, be normatively problematic.

103. *See* Neal Devins & David E. Lewis, *Not so Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 486 (2008) ("Divided government, relatively unusual before 1955, has become the norm over the past fifty years.").

Because the *Chevron* doctrine is based on a presumption that Congress wants the judiciary to defer to reasonable administrative interpretations of ambiguous statutes, it is widely understood that Congress could reverse or overcome this presumption by enacting legislation to the contrary.[104] Yet, this course of action would significantly raise the costs of legislation and might not be successful, or even worth the effort, given the possibility of a presidential veto. Since the explicit goals of modern textualism include establishing a stable interpretative framework for Congress to legislate against and avoiding the judiciary's imposition of its own subjective policy preferences onto the law,[105] it is vital for courts to adopt accurate default rules under this perspective. If Congress would most likely prefer the judiciary to maintain interpretive authority over the resolution of statutory ambiguities, the fact that it could potentially achieve this result with further legislation does not eliminate the tension between *Chevron* and the new textualism.

One potential objection to the preceding analysis would be that it focuses unduly on Congress's likely intentions with respect to the relatively small number of statutes that it enacts during a legislative session. Although Congress presumably wants agencies and courts to respect the deals that it enacts into law, it may be willing to give up some influence over the future resolution of ambiguities in those statutes in exchange for greater control over the present interpretation of ambiguous provisions in the rest of the United States Code. Einer Elhauge has persuasively argued that *Chevron* deference is consistent with rational legislative preferences because it incorporates this tradeoff and increases the likelihood that an agency's policy decisions will reflect the "current enactable preferences" of lawmakers.[106]

Leading textualists have not expressly evaluated Professor Elhauge's intriguing theory, but it explicitly assumes that administrative interpretations of ambiguous statutory provisions are significantly influenced by legislative oversight and ordinarily reflect a broad consensus among members of the executive branch and Congress. Regardless of the accuracy of these

104. *See* Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637 (2003). As indicated above, some would argue that Congress has already done so in the APA. *See supra* notes 81-82 and accompanying text.

105. *Cf.* Manning, *Absurdity*, *supra* note 7, at 2465-68 (explaining that "modern textualists unflinchingly rely on legal conventions that instruct courts, in recurrent circumstances, to supplement the bare text with established qualifications designed to advance certain substantive policies," and claiming that "[t]hese background conventions, if sufficiently firmly established, may be considered part of the interpretive environment in which Congress acts").

106. *See* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002).

propositions,[107] the ability of legislators to influence the meaning of statutes outside of the formal lawmaking process is in severe tension with textualist theory.

In this regard, John Manning has explained that textualism is based upon structural constitutional norms that preclude legislators from exercising control over the manner in which statutes are implemented unless they overcome the hurdles of bicameralism and presentment.[108] Judicial reliance upon legislative history as authoritative evidence of legislative intent allegedly violates this mandate because it allows certain members of Congress to speak for the entire body on questions that were not explicitly resolved by the plain meaning of the text that was enacted. Although courts may admittedly consult dictionaries, judicial precedent, and other extrinsic sources of statutory meaning that were not adopted pursuant to the constitutionally-mandated lawmaking procedures, they cannot adopt interpretive practices that allow Congress to delegate law-elaboration authority to its own members without violating principles of separated powers.

From this perspective, a justification for *Chevron* deference that is based on Congress's desire to increase its control over contemporary interpretations of the ambiguous provisions of every existing statute would be highly problematic. First, legislative oversight could be used to pressure or persuade agencies to adopt interpretations that fail to reflect the current enactable preferences of lawmakers. Moreover, even when legislative oversight succeeds in pressuring or persuading agencies to adopt interpretations that do reflect current enactable preferences, elected lawmakers should presumably be required to go through the constitutional motions.

One could attempt to distinguish the judiciary's use of legislative history in statutory interpretation from legislative oversight regarding the manner in which agencies implement the law on a couple of related bases. First, congressional influence over agency statutory interpretation is not "authoritative" in the same sense as judicial use of legislative history because in the former context, officials outside of Congress are ultimately making the final decision. Second, agencies frequently implement statutes pursuant to notice-and-comment rulemaking procedures that arguably promote the underlying goals of bicameralism and presentment.[109] Accordingly, there is nothing wrong with members of Congress seeking to influence how agencies interpret statutes, so long as the applicable APA provisions are satisfied.

The first distinction is questionable as a formal matter because even when the judiciary relies upon legislative history to interpret statutes, offi-

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107. For reasons described below, if the first assumption is true, and the second is not, then Elhauge's theory becomes even more problematic from the perspective of textualist theory.

108. *See* Manning, *Nondelegation*, *supra* note 29.

109. *See* 5 U.S.C. §§ 553, 706.

cials outside of Congress (namely, judges) ultimately make the final decision. From a practical standpoint, moreover, legislative influence or pressure could become "authoritative" (in the sense of proving dispositive) if an agency's budgetary resources or other favorable treatment was conditioned upon its willingness to implement existing statutes in the manner preferred by the relevant congressional committees. Because the statements and actions of legislative committees are typically more visible and transparent and subject to more effective safeguards in the context of enacting legislation than they are in the context of overseeing subsequent regulatory behavior, congressional oversight of existing regulatory programs should be *more problematic* from a textualist perspective than judicial reliance upon legislative history in statutory interpretation.[110]

The second distinction, which suggests that administrative procedures can "cure" an otherwise problematic delegation of policymaking authority to administrative agencies,[111] implies a very different approach to administrative law from what is usually favored by textualists. From this perspective, agencies should only receive *Chevron* deference if their interpretive decisions were the product of notice and comment rulemaking or other relatively formal procedures. Second, the discretionary policy choices that are made by agencies pursuant to broad delegations of authority should be subject to hard-look judicial review to ensure that they engaged in reasoned decision making. Third, the concern with undue congressional influence over agency decision making could be addressed in part by prohibiting ex parte contacts between legislators and agency officials during the rulemaking process or by requiring those communications to be disclosed in the administrative record. Yet, leading textualists tend to be the most vocal critics of the judiciary's decisions in *Mead*, *State Farm*, and *HBO*, the canonical administrative law cases that respectively endorsed the foregoing doctrines.[112] Thus, at the end of the day, a serious tension remains between

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110. *See, e.g.*, Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 50-55 (1994) (claiming that congressional oversight threatens the President's ability to execute the laws faithfully).

111. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996). *See also* Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 443-47 (2003) (claiming that APA procedures and hard-look judicial review promote reasoned deliberation in the administrative process and thereby compensate for the absence of representation and bicameralism and presentment).

112. *See* United States v. Mead, 533 U.S. 218, 239, 261 (2001) (Scalia, J., dissenting) (dissenting "even more vigorously from the reasoning that produces the Court's judgment," and opining that the decision is "one of the most significant opinions ever rendered by the Court dealing with the judicial review of administrative action" and that "[i]ts consequences will be enormous, and almost uniformly bad"); JAMES B. STAAB, THE POLITICAL THOUGHT OF JUSTICE ANTONIN SCALIA: A HAMILTONIAN ON THE SUPREME COURT 22 (2006) ("Over the years, Scalia has been a sharp critic of 'hard-look' scrutiny by courts in reviewing the factual

textualist theory and the administrative law doctrines that are favored by textualists, including a very broad scope for *Chevron*'s domain.[113]

A similar analysis would apply to the judiciary's adoption of a presumption against judicial review of non-enforcement decisions under the APA. The most plausible way to square this decision with textualism is to resort to the notion that since either Congress or an agency can overcome this presumption by codifying their enforcement priorities, the Court has merely established a default rule that lawmakers intend to provide agencies with unfettered enforcement discretion.[114] In this regard, the enforcement provisions of many regulatory statutes are written in discretionary terms.[115] Moreover, Judge Easterbrook has pointed out that some statutes are only enacted because some legislators anticipate that their provisions will never be fully enforced.[116] Finally, Congress treats the appropriation of funds, which is a precondition of law enforcement, as a distinct matter from the substantive rules of law that an agency is charged with implementing.[117] Accordingly, Congress may understand enforcement as a distinctive policy sphere, which is unrelated to the substantive meaning of the laws that it has enacted.

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and policy determinations of administrative agencies."); Scalia, *Role of Judiciary*, *supra* note 62, at 196-97 (endorsing the D.C. Circuit's refusal to invalidate a legislative rule based on undisclosed ex parte contacts in *Sierra Club v. Costle*, and claiming that "if you thought that [the] formula [at issue] was scientifically arrived at and was not the product of a political compromise between the high-sulphur states and the low-sulphur states, you believe in Santa Claus").

113. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001) (coining this term).

114. *See* Heckler v. Chaney, 470 U.S. 833, 833, 838 (1984) (establishing a presumption against judicial review of an agency's non-enforcement decisions that can be overcome "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers," and emphasizing that it was "essentially leav[ing] to Congress, and not to the courts, the decision as to whether an agency's refusal to institute proceedings should be judicially reviewable").

115. This consideration may provide the strongest basis for squaring broad enforcement discretion with textualism. On the other hand, textualists have a tendency to resist the conclusion that seemingly *mandatory* statutory language eliminates absolute enforcement discretion. *See Chaney*, 718 F.2d at 1196 (Scalia, J., dissenting) (pointing out that "[m]ost of the criminal code is cast in . . . mandatory terms, and yet prosecutors' discretion not to indict is the archetype of unreviewable enforcement discretion"). Their resistance to citizen-suit provisions also demonstrates that textualists would prefer to limit Congress's ability to restrict the enforcement discretion of the executive branch. *See supra* note 67 and accompanying text.

116. *See* Easterbrook, *Judicial Discretion*, *supra* note 8, at 12 (providing an example of this phenomenon).

117. *See* ESKRIDGE ET AL., *supra* note 18, at 448 (describing the distinction between legislative authorizations and appropriations).

The problem, once again, is not only that Congress has failed to adopt this view explicitly,[118] but that Congress would be unlikely to endorse a presumption that gives executive branch agencies unfettered discretion to ignore a large percentage of its substantive mandates. During periods of divided government, the majority party in Congress would presumably resist handing over such a powerful tool to the leader of the opposing political party. Even when a single party controls the executive and legislative branches, political compromise would routinely be necessary for successfully enacted legislation to overcome the hurdle of bicameralism. As indicated above, one of the central goals of textualism is to establish interpretive rules that facilitate bargaining by rendering the law's application more predictable. Yet, the adoption of a presumption that the executive has absolute enforcement discretion dramatically undermines this goal, if not rendering it impossible. Moreover, the action needed to overcome this presumption would significantly raise the transaction costs associated with enacting meaningful legislation and face the possibility of a presidential veto. The vocal opposition by members of Congress to President George W. Bush's use of "signing statements" to express his disagreement with certain statutory provisions and instruct executive branch agencies not to enforce those provisions strongly supports the conclusion that Congress does not have a meta-intent to give the executive branch absolute discretion to refuse to implement its legal mandates.[119]

This is not to say that Congress wants stringent judicial review of every non-enforcement decision. Rather, the question is whether Congress would prefer a default rule that gives agencies absolute enforcement discretion, or whether Congress would prefer a default rule that subjects executive decisions not to enforce the law to deferential judicial review under the arbitrary and capricious standard.[120] For the foregoing reasons, it seems likely that Congress would prefer the latter course of action. While this approach is opposed by *textualists* for other reasons, it would limit the extent to which unelected officials exercised unfettered discretion to allow deviations from

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118. As with *Chevron* deference, the relevant provisions of the APA arguably cut the other way. *See, e.g.*, Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157, 178-79 (1996). *But cf.* Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004) (holding that federal courts can only entertain actions to "compel agency action unlawfully withheld or unreasonably delayed" under 5 U.S.C. § 706(1) of the APA "where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*").

119. *See* CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 248-49 (2007) (describing the "sustained reaction in Congress" to the controversy over the Bush–Cheney signing statements).

120. For examples of arguments in favor of the latter approach, see Heckler v. Chaney, 470 U.S. 821, 840-42 (1984) (Marshall, J., concurring); Bhagwat, *supra* note 118, at 182-91.

unambiguous statutory language—and thereby comport more comfortably with *textualist theory*.

This Part has shown that several legal doctrines that are strongly embraced by textualists cannot be squared with textualist theory. Those doctrines appear consistent with textualism at first blush because they purport to cabin judicial discretion, but they simultaneously allow unelected officials in another branch of government to deviate from the deal that was originally enacted by Congress in ways that conflict with textualism's understanding of the legislative process, the constitutional structure, and the proper role of a faithful agent of Congress. At the same time, however, those doctrines also shift policymaking authority from Congress and the judiciary to the executive branch in ways that are consistent with unitary executive theory—which was also developed during the Reagan Administration and is fully embraced by the leading adherents of textualism.[121] The remainder of this Article will contend that recent efforts by textualists to square this package of theoretical commitments are either beside the point or unpersuasive and that the new textualism and unconstrained executive discretion are fundamentally incompatible with one another.

IV. RECENT ATTEMPTS TO SQUARE THE CIRCLE

Textualists claim that a statute is a fragile compromise that should be enforced according to its plain terms by the judiciary, but they also believe that executive branch agencies should be given free reign to disregard many statutory violations (*Heckler*) and greater flexibility to adopt reasonable interpretations of the law (*Chevron*). As Judge Easterbrook has explained, such agency decisions can and often will be "generated politically, by who gains and loses, and by the agency's view of good outcomes."[122] Textualists therefore have a very different understanding of the proper role of the judiciary and executive branch agencies in implementing the law.

A. The Unwarranted Shift in Focus (An Internal Critique)

In recent years, a few prominent textualists have begun to recognize the inherent tension between their contrasting views of judicial and adminis-

121. *See* Morrison v. Olsen, 487 U.S. 654, 697-99 (1988) (Scalia, J., dissenting); Frank H. Easterbrook, *Unitary Executive Interpretation: A Comment*, 15 CARDOZO L. REV. 313 (1993). *See also* Devins & Lewis, *supra* note 103, at 482 ("Reagan's pursuit of the 'unitary executive' through appointments, judicial filings, and regulatory review was a sea change.").

122. Easterbrook, *Judicial Discretion*, *supra* note 8, at 2 (discussing *Chevron*). *See also* Easterbrook, *Not Enforcing*, *supra* note 62, at 15 ("Making the most of a budget sometimes requires enforcers to make selective changes in the contours of the legal rules they have been handed by Congress.").

trative authority in the implementation of statutes. As Judge Easterbrook has posed the questions, in the context of discussing *Chevron*:

> If statutes are ambiguous, if it is reasonable or even inevitable for agencies to exercise discretion when interpreting laws, if there is just no right answer, then why can't judges do as agencies do? If the statute is addressed to an agency, then the agency has discretion; if the statute is addressed to a judge, then the judge has discretion. Recall that many themes of textualism—such as disregard of legislative history because of the constitutional bicameralism rule and the idea that consistent interpretation over time is part of what it means to say that statutes are law rather than simply exhortations—seem to be as applicable to agencies as to judges. What is more, the foundation for textualist interpretation—that judges must be faithful agents of legislative decisions—seems no less applicable to agencies. Under Article II, the President and his staff are supposed to faithfully execute the law, not manipulate the law. So if discretionary interpretation is OK for officers under Article II, why is it not OK for officers appointed under Article III? If textualism is required for Article III officers, why not for Article II officers?
>
> And if the judge has discretion, why not a policy-oriented discretion? Does it not seem inconsistent for judges to deny themselves a power that they grant to the Bureau of Prisons? Indeed, don't the rationales for deferring to administrative interpretations show that the foundation of textualism on the bench is quicksand? If there is no right answer for statutes addressed to agencies, there is no right answer for statutes addressed to judges, and we had best face up to that fact.[123]

Judge Easterbrook's response to this quandary is to maintain that executive branch agencies should interpret statutes at a higher level of generality than the federal judiciary. In other words, agencies should interpret statutes by abstracting away from "inputs" and concentrating on outcomes, while the federal judiciary should read the law "as a code of things to do rather than a set of objectives to achieve."[124] This approach would result in "a relatively unimaginative, mechanical process of interpretation in court, coupled with a richer, more contextual method out of court."[125]

Although this position is unsurprising, what is important for present purposes is how Judge Easterbrook reaches his conclusions and whether his analysis is consistent with textualist theory. He begins by distinguishing between several types of administrative discretion and claiming that *Chevron*-style deference applies only when Congress has delegated lawmaking authority to administrative agencies.[126] He proceeds to explain that Congress frequently delegates lawmaking authority to agencies rather than courts because this course of action (1) promotes national uniformity by allowing administrative agencies to make authoritative decisions regarding their programs that are relatively insulated from second-guessing by a large

123. Easterbrook, *Judicial Discretion*, *supra* note 8, at 3-4 (footnotes omitted) (emphasis omitted).

124. *Id.* at 10 (emphasis omitted).

125. *Id.* at 18 (emphasis omitted).

126. *See id.* at 5-6.

and diverse federal judiciary; (2) allows agencies to adjust the implementation of their programs in response to technological changes or shifts in the political environment without the need for a statutory amendment; and (3) facilitates political accountability by allowing policymaking decisions to be made by administrative officials who are subject to ongoing presidential control and legislative oversight.[127] On this last point, Judge Easterbrook contrasts the life tenure and resulting independence of the federal judiciary, which—in combination with the difficulty of amending statutes to override their policy decisions—encourages courts to stray from the contemporary political equilibrium in favor of their own preferences and eliminates the electorate's ability to hold judges accountable for their decisions. Finally, he points out that because courts do not control their own agendas and necessarily resolve litigated issues in isolation, their decisions will potentially distort legislative bargains in ways that cannot be restored through subsequent statutory amendments.[128] Agencies, in contrast, which are capable of engaging in logrolling across issues, "can and do make multi-dimensional decisions, creating packages to surmount political impasses."[129] According to Judge Easterbrook, these institutional differences between agencies and courts imply "a big difference in appropriate interpretive strategy."[130]

These arguments may persuasively explain why a reasonable amount of executive discretion is necessary and appropriate, but they do not undermine the conclusion that the theoretical arguments for textualism apply to most instances of executive branch statutory interpretation. In this regard, modern textualism's use of political science for the proposition that "the precise lines drawn by any statute may reflect unrecorded compromises among interest groups, unknowable strategic behavior, or even an implicit legislative decision to forego costly bargaining over greater textual precision," reflect observations about the legislative process that should hold regardless of the identity of the subsequent interpreter.[131] The increased bargaining power that is provided to political minorities by the constitutional requirements of bicameralism and presentment is also a fundamental attribute of the legislative process. Finally, the incentives for Congress to enact bright-line rules that are allegedly created by judicial independence and the separation of governmental functions are expected to be manifested in the legislative product. Since subgroups in Congress have the ability to influence subsequent agency decisions pursuant to their oversight authori-

127. *See id.* at 7-10.
128. *See id.* at 10-12.
129. *Id.* at 12.
130. *Id.*
131. Manning, *Absurdity*, *supra* note 7, at 2390; *see supra* notes 22-26 and accompanying text.

ty,[132] modern textualism's refusal to depart from the plain meaning of statutory language to avoid political favoritism and promote political accountability should presumably be considered even more essential in this context. Because the major theoretical arguments for textualism are based upon a particular understanding of the legislative process and the constitutional structure's role in influencing statutory products, it is difficult to see why this methodology should be discarded simply because an executive branch agency is implementing the statute rather than a federal court. In other words, if textualism is required by a particular understanding of *legislation*, the subsequent interpreter's identity should be irrelevant. Yet, Judge Easterbrook's argument for the use of different interpretive strategies by agencies and courts has everything to do with his understanding of the attributes of the respective interpreters, and almost nothing to do with his understanding of legislation.

The only aspect of his argument for distinctive interpretive approaches that is concerned with fidelity to the original legislative deal is reflected by his observation that "[l]itigation breaks bulk, and this implies a big difference in appropriate interpretive strategy."[133] It is almost certainly true that the manner in which issues are presented in litigation can distort multi-faceted deals that were agreed upon by Congress. Yet, elected representatives are surely aware of this possibility when they enact legislation, and their deals are therefore properly understood to be contingent upon the results of subsequent litigation. More important, the fact that agencies typically have the authority to adopt multi-faceted bargains does not mean that their actions will be more faithful to the decisions of the enacting Congress. On the contrary, agencies are likely to use their discretionary authority to enact "new deals" that are more likely than judicial decisions to deviate from the original legislature's expectations over time.[134] Thus, the lone aspect of Judge Easterbrook's argument that pays lip service to the importance of respecting the original legislative deal paradoxically endorses a practice that is likely to result in even more significant departures from this ideal.

In a similar vein, Professors Jack Goldsmith and John Manning have recently articulated a new understanding of presidential power that provides the executive branch with substantial discretionary authority in precisely those areas of statutory implementation that are the most relevant for present purposes. Specifically, they claim that Article II of the Constitution should be understood to provide the President with a "completion power," which enables him "to prescribe incidental details needed to carry into execution a legislative scheme, even in the absence of congressional authori-

132. *See, e.g.*, J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443 (2003).

133. Easterbrook, *Judicial Discretion*, *supra* note 8, at 12.

134. *See supra* notes 99-100 and accompanying text.

zation to complete that scheme."[135] This completion power is defeasible in the sense that "Congress can limit it, for example, by denying the President the authority to complete a statute through certain means or by specifying the manner in which a statute must be implemented."[136] Nonetheless, "in the absence of such affirmative legislative limitation or specification, courts and Presidents have recognized an Article II power of some uncertain scope to complete a legislative scheme."[137] According to Goldsmith and Manning, the President's completion power explains, among other things, the broad enforcement discretion that is accorded to the executive branch, as well as the judiciary's practice of deferring to reasonable interpretations of ambiguous statutory provisions by executive branch agencies.[138]

The President's completion power may, in fact, provide a useful way to understand the foregoing instances of executive branch discretion. By grounding the President's authority in Article II of the Constitution, this theory eliminates the need to justify absolute enforcement discretion and *Chevron* deference by resorting to unreliable notions of Congress's presumed intent. The theory also recognizes that because Congress cannot adopt "a pellucid and all-encompassing code" on any given subject, the implementation of the law will necessarily require substantial policy discretion.[139] The problem, once again, is that the President's completion power conflicts with the theory of the legislative process and constitutional structure that underlies modern textualism. As explained above, unconstrained enforcement discretion grants executive branch agencies the authority to disregard the plain terms of statutory deals, and similar tendencies are at least subtly implicit in *Chevron*. These doctrines should therefore be problematic for textualists, regardless of whether they are purportedly justified by presumed legislative intent *or* inherent executive authority. Since John Manning, in particular, is widely considered the legal academy's strongest proponent of the new textualism, his apparent willingness to endorse the President's completion power is a bit puzzling.[140]

The tension between modern textualism and the President's completion power is most evident if one considers the purported rationale for the latter doctrine. In this regard, Goldsmith and Manning trace the genesis of

135. Goldsmith & Manning, *supra* note 14, at 2282.
136. *Id.*
137. *Id.*
138. *See id.* at 2293-95, 2298-2302.
139. *See id.* at 2305.
140. Goldsmith and Manning expressly state that their discussion of the President's completion power is only intended to be preliminary and descriptive, and that they are not necessarily endorsing the doctrine. *See id.* at 2887. Nonetheless, the tenor of the Article suggests that they are at least sympathetic to the idea of endorsing this practice.

the President's completion power to Chief Justice Vinson's dissent in the Steel Seizure Case.[141] As Goldsmith and Manning explain it:

> Vinson described the legislative program at a high level of generality and implicitly conceded that it contained no mandate, express or implied, to seize the steel mills in the circumstances before the Court. Nonetheless, in Vinson's judgment, the successful execution of a vast body of legislative commitments depended upon the President's ability to keep the mills functioning.[142]

Goldsmith and Manning read Vinson's opinion to conclude that, based in part on some historical precedent, "the executive Power and the Take Care Clause include a completion power that enables the President to go beyond (but not against) the implemental prescriptions of particular statutes, when necessary to effectuate the legislative program."[143] They proceed to contend that although Vinson lost the battle in this case, he subsequently won the war over executive power because the President's completion power has been incorporated into the law in a variety of important ways.[144] This has occurred, moreover, precisely because unanticipated situations will inevitably arise when the law is implemented that were never explicitly resolved by Congress.[145]

The essential point for present purposes is that the President's completion power is, in effect, a *strongly purposive* approach to implementing statutes. The idea is that statutes are inherently ambiguous because of the imprecision of language and the limited foresight of lawmakers. Public officials who are responsible for implementing the law will therefore necessarily have substantial discretion, which should be exercised in a manner that leads to the "successful execution" of "legislative programs" under the relevant circumstances. President Truman's decision to seize the steel mills should therefore arguably have been permitted because it was a sensible means of promoting the successful war effort that underlay "a vast body of legislative commitments." Indeed, the President's completion power is implicitly based upon the same theories of the legislative process and constitutional structure as purposivism. For example, it appears to presume that legislators are "reasonable persons pursuing reasonable purposes reasonably."[146] Similarly, it appears to presume that statutes are ordinarily designed

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141. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 667 (1957) (Vinson, C.J., dissenting).

142. Goldsmith & Manning, *supra* note 14, at 2284.

143. *Id.* at 2285 (internal quotations omitted).

144. *See id.* at 2287-2302.

145. *See id.* at 2304-08.

146. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958).

to achieve instrumental purposes that will promote the public good.[147] And, if all of this is true, why shouldn't courts also have authority to implement statutes purposively in the cases and controversies before them (*viz.*, "to go beyond (but not against) the implemental prescriptions of particular statutes, when necessary to effectuate the legislative program")? Yet, leading textualists, including John Manning, have vigorously attacked these understandings of legislation and their implications for statutory interpretation by the judiciary.[148] Manning—like Easterbrook and Scalia—therefore has a completely different understanding of the role of the judiciary and the executive branch in implementing statutes that is based upon fundamentally incompatible theories of legislation.

B. The Problematic Resort to Formalism (An External Critique)

Because textualism's understanding of legislation would compel executive agencies to interpret statutes in a textualist fashion, textualists who disagree with this result naturally change the subject when they advocate "a richer, more contextual method" of interpretation by agencies. Their approach is to rely upon formal distinctions among governmental functions and between law and policy, in addition to claiming that executive branch agencies are politically accountable while the federal judiciary is not. Setting aside the internal incoherence and unwarranted shift in focus that was described in the preceding section, there are major shortcomings with these arguments as well.

First, statutory ambiguity is used as a signal under *Chevron* that an interpretive issue is a policy matter that should presumably be resolved in an authoritative manner by politically accountable officials within the executive branch, rather than a legal issue that should be resolved by the independent judiciary.[149] It should be clear, however, from the earlier discussion of this framework that ascertaining whether a statute *is* ambiguous can itself be a matter of great uncertainty.[150] Courts will therefore necessarily be called

147. *See* Staszewski, *Avoiding Absurdity*, *supra* note 6, at 1026 (describing the civic republic understandings of the legislative process and constitutional structure that underlie strongly purposive approaches to statutory interpretation).

148. *See, e.g.*, Manning, *Textualism*, *supra* note 5; Manning, *Absurdity*, *supra* note 7, at 2395-2419.

149. *See* Pierce, *supra* note 11, at 199-205 (explaining that *Chevron*'s framework distinguishes between judicial interpretation and agency policymaking).

150. *See* Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1091 (1997) (recognizing that the line between clarity and ambiguity under *Chevron* "has a highly random aspect to it," and claiming that textualists have a tendency to apply the doctrine in a manner whereby "judicial intervention" comes to resemble "Russian Roulette: one never knows in advance when the chamber will fire, but when it does the result will often be fatal to agency policy"); Molot, *supra* note 3, at 51 (explaining that *Chevron*'s dichotomy between clarity and ambiguity "is inherently manipulable").

upon to determine the boundaries of law and policy and thereby to allocate governmental authority. To the extent that textualism resolves close cases by expanding the scope of law and the corresponding degree of judicial authority under step one of the *Chevron* framework, this interpretive method squarely conflicts with the primary reasons for deference to executive authority that are otherwise articulated by textualists. To the extent that textualists resolve close cases by finding statutory ambiguity and deferring to reasonable agency interpretations under step two of *Chevron*, they may no longer be adhering to textualism.

Meanwhile, textualists tend to defend absolute enforcement discretion on the grounds that enforcement decisions are at bottom policy determinations that should be made by politically accountable officials.[151] While the promulgation of a statute or regulation presumably reflects "a deal" regarding the substantive content of "the law," the executive's enforcement decisions are another matter altogether.[152] The *meaning* of a statute or regulation is governed by *law* and is therefore the proper subject of interpretation by courts in an Article III case or controversy. Yet, a decision not to enforce a statute or regulation in the first instance is a *policy* matter that presumably falls within the absolute discretion of the executive branch and is therefore not properly subject to judicial review. A contrary decision would allow politically unaccountable courts to interfere with the executive's ability to make politically acceptable decisions and potentially displace the policy choices of administrative agencies in favor of the preferred interests of the courts.[153]

A willingness to embrace textualism *and* unbridled enforcement discretion is therefore premised on at least three basic assumptions. First, elected officials (and, in turn, the regulators whom they oversee) are accountable to the general public in a meaningful way. Second, a formal division between law and policy can be maintained. Third, a formal distinction among executive, legislative, and judicial functions is sustainable. Each of these assumptions is problematic, particularly in the context of official decisions not to enforce otherwise applicable legal rules.

Although the notion that democratically elected officials are accountable to the people has been treated as gospel in modern public law theory and doctrine,[154] this proposition has recently begun to receive critical scrutiny

151. *See, e.g.*, Easterbrook, *Not Enforcing*, *supra* note 62, at 14-15; Scalia, *Responsibilities*, *supra* note 62, at 105-08.

152. *See supra* notes 62-64 and accompanying text.

153. Textualists, of course, also defend strong deference to administrative agencies under the second step of *Chevron* for similar reasons. *See supra* notes 88-89, 112 and accompanying text (describing a textualist conception of the *Chevron* framework and noting that Justice Scalia is a sharp critic of hard-look judicial review).

154. For example, this idea provides the impetus for the countermajorian difficulty in constitutional law, which has been the central obsession in constitutional scholarship in the

from legal scholars and political scientists.[155] Most voters do not have detailed information about the activities of their elected representatives or make voting decisions on this basis.[156] It is therefore unlikely that voters hold elected officials "accountable" for their policy decisions in the manner that seems to be envisioned by the conventional rhetoric.[157] Moreover, the notion that voters are capable of holding a chief executive (or, for that matter, the members of a legislative oversight committee) electorally accountable for the discretionary policy choices of administrative agencies (including particular non-enforcement decisions) seems preposterous, except in truly extraordinary circumstances.[158] Textualists could, of course, always rely upon formal theories of representation for the idea that elected officials have greater democratic legitimacy than unelected decision makers, but this particular view would neither prove that elected officials are truly accountable to the voters nor explain why administrative agencies have greater democratic legitimacy than the courts.

Textualists must therefore also believe that the *political influence* of the chief executive and legislature will make administrative agencies more responsive to the current will of the people.[159] This could occur if elected

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United States for more than fifty years. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962); *see also* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002) ("For decades, legal academics have struggled with the 'countermajoritarian difficulty': the problem of justifying the exercise of judicial review by unelected and ostensibly unaccountable judges in what we otherwise deem to be a political democracy.").

155. *See generally* Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073 (2005); Jane S. Schacter, *Political Accountability, Proxy Accountability, and the Democratic Legitimacy of Legislatures*, *in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 47 (Richard W. Bauman & Tsvi Kahana eds., 2006); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253 (2009) [hereinafter Staszewski, *Reason-Giving*].

156. *See* Schacter, *supra* note 155, at 47-48; Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287 (2004).

157. *See* Schacter, *supra* note 155, at 45-48; Staszewski, *Reason-Giving*, *supra* note 155, at 1265-77.

158. *Cf.* Staszewski, *Reason-Giving*, *supra* note 155, at 1270-71.

159. *See* Easterbrook, *Judicial Discretion*, *supra* note 8, at 9 (explaining that "judges have tenure to make it easier (because less costly) for them to be faithful to decisions taken in the past," and claiming that "[i]f these decisions are to be updated, that should be done by those who are supposed to be sensitive to the contemporary will—administrative officials, Congress, the President"); Scalia, *Judicial Deference*, *supra* note 73, at 518 ("If Congress is to delegate broadly, as modern times are thought to demand, it seems to me desirable that the delegee be able to suit its actions to the times, and that continuing political accountability be assured, through direct political pressures upon the Executive and through the indirect political pressure of congressional oversight."); Scalia, *Responsibilities*, *supra* note 62, at 107 ("The major factor in [the judiciary's] exclusion [from making policy decisions], I suggest, is that the decisions are supposed to be political ones—made by institutions whose managers

officials had a clear mandate from the voters and acted consistent with their expectations, but it seems unlikely in an era that is characterized by a closely divided electorate with limited knowledge of, or opinions about, the detailed policy questions that confront agencies.[160] It could also occur, however, if elected representatives vigorously pursued the apparent preferences of their constituents who stood to be affected by particular administrative decisions. In other words, agencies may be accountable to the voters because elected representatives exert political pressure on agencies to adopt policies that further the pre-political interests of their constituents.

Although it is likely that this is the type of political accountability that textualists ultimately have in mind, they seem to disregard the lessons of public choice theory that underlie their approach to statutory interpretation in the public administration context. If narrow private interests have organizational advantages that allow them to extract "rents" from the general public in exchange for providing support to self-interested public officials, the implementation of a theory that relies upon elected representatives to exert political pressure on agencies to further the interests of their "constituents" is a recipe for disaster (or, at least, regulatory capture).[161] Justice Scalia's position that statutory beneficiaries (*i.e.*, "the majority") do not need any outside assistance in the "political process" of administrative decision making may therefore be unwarranted.[162] On the contrary, public choice theory tells us that the diffuse public interests that are typically promoted by modern social welfare legislation will systematically be disadvantaged by an unregulated administrative process.[163]

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change with each presidential election and which are under the constant political pressure of the congressional authorization and appropriations processes.").

160. *See* Staszewski, *Reason-Giving*, *supra* note 155, at 1266-68, 1271 (describing the limited political knowledge of American citizens and explaining that "the vast majority of regulatory decision making flies beneath the general public's radar and implicates established preferences of the electorate only at very high levels of abstraction").

161. *See* McNollgast, *The Political Economy of Law*, *in* HANDBOOK OF LAW AND ECONOMICS 106 (A. Mitchell Polinsky & Stephen Shavell eds., Handbooks in Economics No. 27, 2007) ("If elected officials are a willing co-conspirator in agency capture, evidence that they influence policy will not assuage fears that the public interest is subverted.").

162. *See supra* notes 65-67 and accompanying text. *See also* Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 56-57 (2008) (recognizing that Justice Scalia's view of standing "fails to incorporate the lessons of public choice theory," and claiming that government decisions that harm most of the general public are "precisely those types of defaults that might be most likely not to receive fair consideration in the normal political process, assuming an asymmetry between the distribution of costs and benefits"); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 215-20, 219 (1992) (criticizing Justice Scalia's theory of standing and pointing out that "some majorities are so diffuse and ill-organized that they face systematic transaction costs barriers to the exercise of ongoing political influence").

163. *See* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 34-41, 39-40 (1998) (describing the central aspects of public

There is no reason to believe that this concern is inapplicable to non-enforcement decisions (or the resolution of statutory ambiguity). Rather, the choice regarding whether to investigate or prosecute an apparent violation of the law provides a quintessential example of governmental action that significantly affects a concentrated private interest with only a relatively marginal impact on the disorganized general public. This would therefore be the ideal context for governmental officials to favor narrow private interests over the public good to promote their own selfish interests, regardless of the actual merits of a case.[164]

In addition to their selective use of public choice theory, textualists also seem to have a schizophrenic understanding of the proper role of a "faithful agent of the legislature." Specifically, the new textualism is premised upon the notion that the complex and competitive nature of the legislative process renders a conception of legislative intent distinct from enacted statutory language "meaningless," and therefore "the only safe course for a faithful agent is to enforce the clear terms of the statutes that have emerged from that process."[165] Meanwhile, however, textualists also believe that the President, who is charged by the Constitution with "tak[ing] Care that the Laws be faithfully executed,"[166] has absolute discretion (often through his

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choice theory and explaining that from this perspective, "[i]nterest groups with the most at stake in a particular regulatory decision, who spend the most to buy that decision, typically see their demand for regulation met by legislators who acquiesce in order to enjoy continued electoral success and the benefits that holding office brings"). Justice Scalia candidly recognized (and perhaps endorsed) this possibility when he lamented the demise of limitations on standing that resulted from judicial decisions during the 1970s:

> As recently as two decades ago, much of the agencies' ability to operate as part of the political process was attributable to the doctrines of ripeness and standing. . . . The doctrine of standing, [in particular], was almost tailor-made to protect political discretion. It is rudimentary political science that slight harm, expense or inconvenience imposed upon a large, diffuse body of the population will generally not arouse effective political opposition. But diffuseness, expansiveness, lack of particularity was what the doctrine of standing was all about. In other words, it excluded from the courts *precisely* those interests that were likely to lose in a rule-making proceeding with substantial political content—the potential hikers and campers who would be harmed by construction of a new ski-resort, to take a real-life example.

Scalia, *Rulemaking*, *supra* note 65, at xxvi (emphasis supplied) (citing Sierra Club v. Morton, 405 U.S. 727 (1972)).

164. *See* Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 306 (2004) ("*Heckler v. Chaney* arose in a setting—nonenforcement—in which concerns about agency capture would seem particularly pronounced."). Lisa Bressman has argued that non-enforcement decisions should be subject to judicial review and that agencies should be obligated to adopt enforcement standards largely for this reason. *See* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657 (2004).

165. Manning, *Absurdity*, *supra* note 7, at 2390.

166. U.S. CONST. art. II, § 3.

subordinates) to decline to enforce the clear terms of the statutes that have emerged from exactly the same legislative process.[167] Accordingly, textualists plainly understand the very existence and nature of the duty of fidelity that is owed to Congress to vary depending upon whether the "faithful agent" that is implementing the law is a member of the executive branch or the judiciary.

It is not clear, however, why this disparity should exist, particularly in the context of those enforcement decisions that involve unambiguous violations of plain statutory language. The preceding discussion has explained that alleged differences in the political accountability of the decision makers do not justify the executive's broad and unconstrained enforcement discretion. Moreover, the claim that the judiciary must enforce "the law," while the executive is free to exercise "policy discretion," is unconvincing in this context because both decision makers are, in reality, doing exactly the same thing—*i.e.*, choosing whether to recognize an exception to an otherwise applicable statutory rule based on the particular circumstances.[168] For similar reasons, reliance upon a formal understanding of separated powers is tautological in this context because the official recognition of exceptions to otherwise applicable statutory language could be understood as legislation (the text is, after all, effectively being amended), interpretation (such as where the judiciary avoids absurd results), *or* execution of the law.[169] Finally, it is difficult to see why Congress would distinguish so sharply between the responsibilities of the governmental officials who are responsible for implementing its "deals."[170]

Because the new textualism's conception of the obligations of a faithful agent of Congress is allegedly mandated by the Constitution based on a particular understanding of the legislative process and the requirements of bicameralism and presentment, the same principles should apply regardless of who is implementing Congress's mandate. It should presumably be *unconstitutional* under this view for the legislature to delegate unbridled discretionary authority to disregard the plain meaning of duly enacted statutes

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167. *See supra* notes 60-64 and accompanying text.

168. *See* Bhagwat, *supra* note 118, at 176 (explaining that "it is a relatively elementary legal realist insight that when there is a single enforcement authority, a decision not to enforce under stated circumstances is indistinguishable from amending the underlying 'rule' to exempt the affected conduct from prohibition," and claiming that "[t]he contrary view, that enforcement policy is fundamentally different from 'law,' rests on a formalistic definition of law which has been largely discarded since the realist revolution of a half century ago").

169. *Cf.* M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 604 (2001) ("The effort to identify and separate governmental powers fails because, in the contested cases, there is no principled way to distinguish between the relevant powers.").

170. *See supra* notes 100-120 and accompanying text.

to either the judiciary or the executive branch (even, or perhaps especially, if Congress actually *wanted* those officials to favor particular special interests).[171] Instead of condemning the Court's stance toward non-enforcement decisions by agencies on these grounds, however, textualists maintain that "the balancing of various legal, practical and political considerations, none of which is absolute, is the very essence of prosecutorial discretion."[172]

Of course, textualists could defend their views on enforcement discretion by resorting to an established historical tradition.[173] It is certainly true that, with some exceptions, courts have traditionally declined to review enforcement decisions in both the criminal and civil contexts.[174] Yet, a reliance on historical tradition as the basis for justifying their views on enforcement discretion places an increased premium on the ability of textualists to show that their preferred methodology of statutory interpretation by courts is supported by an established historical tradition as well. Professor Manning has ambitiously attempted to satisfy this burden,[175] but his historical claims about the original meaning of "the judicial power" in statutory interpretation have been persuasively refuted by other leading scholars. For instance, William Eskridge has concluded that the arguments underlying Manning's claim that equitable interpretive techniques are incompatible with the American constitutional structure—and that textualism is constitutionally required—are entirely unsupported by a comprehensive examination of the relevant founding-era materials:

> It is noteworthy that Manning was unable to find a single Framer or a single judge of the period who expressed the link[s] he insists upon. In an article brimming with quotations, unearthed in what must have been a massive research program, it is amazing that he was not able to come up with even one quotation supporting the central claim of his paper. The reason is that lawyers of the period, including im-

171. *Cf.* Manning, *Absurdity*, *supra* note 7, at 2440-45 (claiming that Congress could not lawfully authorize the judiciary to exercise discretion to interpret statutory language contrary to its plain meaning to avoid absurd results).

172. Morrison v. Olson, 487 U.S. 654, 708 (1988) (Scalia, J., dissenting).

173. The extent to which Justice Scalia's views on standing and presidential power are supported by the established historical tradition are subject to dispute. *See* Farber, *supra* note 59, at 1533-35 (claiming that "Scalia's general view of presidential power is at odds with much of mainstream historical scholarship"); Sunstein, *supra* note 162, at 215-21 (criticizing Justice Scalia's theory of standing partly on historical grounds).

174. On the other hand, private rights of action against alleged violators of the law were sometimes authorized by Congress in early American history. *See, e.g.*, Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 290-303 (1989); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 14-22 (1994). To the extent that private citizens could initiate their own enforcement actions, there would be less need for judicial review of non-enforcement decisions by public officials.

175. *See* Manning, *Textualism*, *supra* note 5.

> portant Framers, did not . . . . view the role of equity in statutory interpretation as judicial legislation, as Manning seems to do.[176]

Professor Eskridge found instead that while early statutory interpretation began with the words of the text, founding-era courts actually utilized "a sophisticated methodology that knit together text, context, purpose, and democratic and constitutional norms in the service of carrying out the judiciary's constitutional role."[177]

Even if textualists could satisfy the burden of showing that the "new textualism" is supported by an established historical tradition, they would merely have established that unconstrained enforcement discretion and textualism have this in common. The tensions between textualism and *Chevron* and between textualist theory and broad administrative discretion that were described above would still remain. Accordingly, unless historical tradition should be the be-all and end-all of public law theory and doctrine, the new textualism cannot be squared with the views that textualists have adopted with respect to the executive branch.[178]

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176. *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1038-39 (2001).

177. *Id.* at 990, 1009-30, 1058-87. *See also* Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 373-74 (2005) (claiming that "to the extent that textualists argue that the Constitution requires courts to follow a 'faithful agent' model of the judicial role that forbids all judicial departures from statutory text, they are relying on a textually and historically inappropriate understanding of the Constitution"); Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1094-98 (1998) (claiming that the historical understanding of the judicial power, which was reflected in Blackstone's commentaries and early Supreme Court decisions, allowed courts to deviate from the plain meaning of statutory text in certain cases).

178. It bears noting that textualist judges have frequently been accused of pursuing a conservative political agenda. *See* Easterbrook, *Judicial Discretion*, *supra* note 8, at 18-19 ("One theme you hear in the press, the halls of Congress, and the legal academy is that the move to textualism is political, a conservative reaction to laws enacted by Congresses to the left of those appointing the judges."). Although a thorough evaluation of this claim is beyond the scope of this Article, the preceding analysis may provide some preliminary support for the proposition that their broader package of theoretical commitments has a tendency to lead towards deregulation. Thus, it is commonly understood that it is difficult for Congress to enact a statute in light of the requirements of bicameralism and presentment. *See* ESKRIDGE ET AL., *supra* note 18, at 65-69. Given the dynamics emphasized by public choice theory, it should be even more difficult for the legislature to enact public health, safety, or environmental legislation. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (rev. ed., 1971). When elected officials are nonetheless successful in this endeavor, the new textualism arguably makes it more difficult for Congress to achieve its underlying objectives because courts have a tendency to interpret the law in a relatively stingy fashion pursuant to this methodology. *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 636-46 (1995) (describing the "disciplinarian" approach to statutory interpretation that is employed by textualists and their tendency to employ "narrow, text-based interpretation that limits the reach of legislation by requiring exacting specificity in

CONCLUSION

Modern textualism and the theory of a powerful, unitary executive were developed around the same time by many of the same Reagan Administration officials and their intellectual allies. Both theories have proven tremendously influential over the years and have been strongly promoted by the latest Bush administration. Although both theories are united in their purported efforts to cabin "judicial activism," it has almost entirely escaped notice that they are fundamentally incompatible. Modern textualism relies upon theories of the legislative process and constitutional structure that understand legislation as a fragile compromise that should be enforced according to its plain terms. Yet, a powerful, unitary executive should presumptively be given absolute enforcement discretion and substantial flexibility to interpret the law consistent with his own contemporary policy preferences, even when those decisions could deviate substantially from the original legislative deal. Adherents of both theories therefore simultaneously maintain that "the balancing of various legal, practical and political considerations" is at the core of the executive function, but that any judicial efforts to balance similar considerations in particular cases would depart from "the government of laws that the Constitution established" and no longer qualify as "a government of laws at all."[179]

Leading textualists have recently begun to recognize the undeniable tension between their views on statutory interpretation by courts and the proper degree of executive branch authority. Those efforts at reconciliation are beside the point, however, because the primary theoretical arguments for textualism would continue to apply to most instances of executive branch statutory interpretation. At the same time, formal distinctions between law and policy and among governmental functions are not particularly meaningful in the relevant contexts, and the President is not really politically accountable to the electorate for these decisions. On the contrary, the lessons of public choice theory that underlie modern textualism teach us that we should be especially worried about the dangers of capture by narrow special interests in precisely these areas.

The point of this Article, of course, is not to claim that it is inappropriate for the judiciary to defer to reasonable interpretations of ambiguous

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statutory language"); *cf.* Easterbrook, *Statutes' Domains*, *supra* note 24. Even if the statutory language unambiguously authorized the relevant agency and the judiciary to implement social welfare legislation in an aggressive fashion, the executive branch could use its absolute enforcement discretion to ignore clear statutory violations. *See supra* notes 60-64 and accompanying text. Moreover, the judiciary could decline to recognize the standing of regulatory beneficiaries to challenge the executive branch's inaction. *See supra* notes 65-72 and accompanying text.

179. *See* Morrison v. Olson, 487 U.S. 654, 708, 711-12 (1988) (Scalia, J., dissenting).

statutes by administrative agencies.[180] Nor is it to contend that agencies should be precluded from exercising a reasonable amount of enforcement discretion.[181] Rather, the point of this Article is to show that a legal theory that simultaneously embraces the new textualism and unbridled executive discretion is fundamentally incoherent. A faithful agent of Congress could always adhere to the plain meaning of statutory language or exercise a reasonable degree of policy discretion, but a true believer in modern textualism cannot have it both ways. When textualists nonetheless advocate broad and unconstrained executive discretion, they are effectively acknowledging that their understanding of the legislative process and constitutional structure is ultimately not controlling. Although a heavy emphasis on the text could still be defended in statutory interpretation on other grounds, modern textualist theory loses most of its content and force when stripped of those underpinnings.

180. For my own brief take on *Chevron* deference, see Staszewski, *Reason-Giving*, *supra* note 155, at 1305-06.

181. For some of my thoughts on these questions, see *id.* at 1306-08; Glen Staszewski, *The Federal Inaction Commission*, 58 EMORY L.J. __ (forthcoming 2009).